In the

Supreme Court of the United States

OCTOBER TERM, 1958

No. 335

SUN OIL COMPANY,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WITH APPENDIX

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No.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Sun Oil Company prays that a writ of certiorari issue to review certain judgments of the United States Court of Appeals for the Fifth Circuit entered on May 9, 1958.

OPINIONS BELOW

Six cases involving petitions to review related orders of the Federal Power Commission were consolidated by the Court of Appeals for the purpose of briefing and oral argument (R. 16410, 81).[1] The single opinion of the Court of

[1] References to the record herein are made according to the page of the record printed in each case in the Court of Appeals prior to consolidation of the cases by that Court.

Appeals and the judgments entered in the consolidated cases are printed in the Appendix to this petition; the opinion is not yet reported. The orders of the Federal Power Commission which are the subject of the cases in the Court of Appeals are set forth in the transcript of record (R. 16020, 61; R. 16021, 216; R. 16213, 116; R. 16321, 104; R. 16410, 225; R. 16410, 235; R. 16548, 82).

JURISDICTION

This case involves review of judgments of the Court of Appeals for the Fifth Circuit, and jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act, 15 U. S. C. 717r(b), and the provisions of 28 U. S. C. 1254(1).

DATE OF JUDGMENTS BELOW

The judgments of the Court of Appeals, printed in the Appendix, were dated May 9, 1958, and were entered on the same date. Petitioner's petition for rehearing was denied by the Court of Appeals on June 11, 1958, the order denying the petition being likewise printed in the Appendix.

QUESTIONS PRESENTED

1. Whether the Federal Power Commission may lawfully reject the rate schedule and certificate application filings of a person engaged in a sale of gas subject to the Commission's jurisdiction and vacate a certificate previously issued to such person, on the asserted ground that such person is not a "signatory party" to a gas sale contract, where the various filings meet all formal requirements of the Natural Gas Act and the Commission's regulations.

2. Whether the Federal Power Commission may lawfully reject such filings meeting all formal requirements and vacate the certificate previously issued without any advance notice or hearing and without setting out adequate findings and conclusions.

3. Whether the Federal Power Commission may lawfully certify to the Court of Appeals as a part of the record upon which the order complained of was purportedly entered documents not involving or relating to the Petitioner in any way but instead relating to the filings and proceedings before the Commission of other parties, proceedings to which the Petitioner was in no sense a party.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Natural Gas Act, June 21, 1938, as amended, 52 Stat. 821, 15 U. S. C. §§717-717w; the Administrative Procedure Act, as amended, 60 Stat. 237 (1946), 5 U. S. C. §§1001-1011; and the Fifth Amendment to the Constitution of the United States. Pertinent provisions of each are set forth in the Appendix to this petition.

STATEMENT OF THE CASE

Following this Court's decision in *Phillips Petroleum Company v. State of Wisconsin, 347 U. S. 672 (1954)*, the Federal Power Commission promulgated Orders Nos. 174, 174-A and 174-B incorporating into its regulations provisions especially applicable to "independent producers" of natural gas who are engaged in the sale of such gas in

interstate commerce for resale (18 C. F. R. §§154.91 et seq. and 157.23 et seq.).

In accordance with those regulations, but with various reservations as to jurisdiction, Petitioner filed with the Commission as its rate schedules, pursuant to Section 4 of the Natural Gas Act, a large number of contracts covering the sales of its gas, and in the case of each such sale Petitioner also filed with the Commission an application for a certificate of public convenience and necessity, pursuant to Section 7 of the Natural Gas Act. Included among those initial filings were four rate schedules and four certificate applications which gave rise to the cases in the Court of Appeals.

Each of the four situations involved a gas unit or oil and gas lease in which Petitioner owns less than the entire working interest in the gas production. In two of the cases Petitioner had, prior to the time of filing with the Commission, authorized the operator of the gas producing property to sell Petitioner's portion of the gas production, the operator to act to that extent in Petitioner's behalf and for its account and thus as Petitioner's agent. In the third case Petitioner had extended a like agency authority to the operator of a gas processing plant through which Petitioner's portion of the gas produced from a gas unit is processed. In the fourth case no agency authority was involved because there Petitioner had initially acquired its interest in a gas unit subject to a gas sale contract already in existence.

In each of the three agency cases Petitioner filed with the Commission as its rate schedule a copy of the gas sale contract made by the operator with the gas pipeline purchaser, together with other documents which explained the agency nature of the transaction between Petitioner and the operator. Since the operator acted as Petitioner's agent in making each gas sale involved, to the extent of Petitioner's portion of the gas, the sale by the operator as agent is in law a sale by the Petitioner as the principal, and the sale contract is thus Petitioner's contract to the extent of its portion of the gas involved. It was on the basis of this clear premise that Petitioner filed the various gas sale contracts as its rate schedules. In the fourth case Petitioner had simply acquired an interest in a pre-existing gas sale contract at the same time that it acquired its interest in the gas producing property, and Petitioner filed a copy of such contract with the Commission as its rate schedule, together with another document explaining the acquisition by Petitioner of an interest in the gas sale contract and in the gas producing property. In each of the four cases, even though Petitioner had not physically executed the original gas sale contract of which it filed a copy as its rate schedule, the contract was or had become its contract to the extent of its interest in the gas involved and the contract clearly covered the sale by Petitioner, either directly or as the principal in an agency transaction, of the gas which was the subject of Petitioner's rate schedule filing with the Commission.

In all of the cases the Commission formally accepted Petitioner's rate schedule filings and assigned rate sched-

ule numbers to the documents covering the various gas sales (R. 16020, 50; R. 16021, 197; R. 16021, 203; R. 16021, 205; R. 16213, 108; R. 16410, 160). In addition, in connection with the same gas sales, the Commission, in response to Petitioner's certificate applications, issued certificates of public convenience and necessity to Petitioner covering the various gas sales (R. 16321, 85; R. 16548, 73; R. 16548, 479).

At various times and by various letter orders and formal orders (here under review) issued following the rate schedule acceptances and certificate orders mentioned above, the Commission rescinded its earlier acceptances of Petitioner's rate schedule filings and rejected the rate schedule filings (R. 16020, 61; R. 16021, 216; R. 16213, 116; R. 16410, 225), and rescinded and vacated the certificates previously issued to Petitioner and rejected the applications for such certificates (R. 16321, 104; R. 16548, 82). All of the orders rejecting Petitioner's rate schedule filings and vacating the certificates previously issued to Petitioner were issued without notice to Petitioner and without according Petitioner an opportunity for hearing. All of the orders are based on the Commission's asserted premise that Petitioner is not a "signatory party" to the contracts under which Petitioner's gas is delivered in its behalf to the pipeline purchasers.

Petitioner filed applications for rehearing of the various orders of the Commission which had rejected Petitioner's rate filings and vacated Petitioner's certificates. Petitioner complained, among other things, that the orders exceeded

the Commission's authority under the Natural Gas Act and that Petitioner had not been accorded a hearing in the matters. All of the applications for rehearing were denied in perfunctory fashion. Petitioner then perfected its appeals from the various orders to the Court of Appeals for the Fifth Circuit under the provisions of Section 19(b) of the Natural Gas Act.

By judgments entered on May 9, 1958, based on a single opinion covering all of the consolidated cases, the orders of the Commission were affirmed by the Court of Appeals. Petitioner made timely filing of its petition for rehearing before the Court of Appeals, which the Court denied without opinion on June 11, 1958.

REASONS FOR GRANTING THE WRIT

I. Decision Below Raises Important Questions of Federal Law which Have Not Been, but Should Be, Settled by the Supreme Court.

The basic issue at the heart of this case is whether the Federal Power Commission shall be permitted to ignore important substantive provisions and requirements of the Natural Gas Act in order that it may promote its own administrative convenience and avoid the burden of administering filings of natural-gas companies which are clearly required by the Natural Gas Act. That issue is not adequately considered by either the Commission's orders here under review or the opinion of the Court of Appeals affirming those orders. It is imperative that this Court review the issue in this case before the administrative pattern for

the regulation of the vast producing segment of the gas industry under the Natural Gas Act becomes so firmly fixed in this respect that it may be virtually impossible later to alter the course of regulation to fit the requirements of the Act. Other issues are also present in this case which, although not at the heart of the case, involve other important aspects of the pattern of regulation of the producing segment of the gas industry and thus merit this Court's review in this case.

a. *The Court Below Erred in Its Interpretation of the Natural Gas Act.*

Under the provisions of the Natural Gas Act the requirements for filing rate schedules and securing certificates are imposed directly upon any person "engaged" in the sale in interstate commerce of natural gas for resale. This proposition is both self-evident and inherent in the provisions of Section 2(6) of the Act defining a "natural-gas company" as a person so "engaged" in the sale of gas; in the provisions of Section 4(c) of the Act requiring that "every natural-gas company" shall file with the Commission schedules showing all rates and charges for "any sale" subject to the jurisdiction of the Commission;[2] and in the provisions of Section 7(c) of the Act stating that no natural-gas company shall engage in a sale of gas subject to the Commission's jurisdiction unless there is in force "with

[2]Section 4(c) of the Act also provides that such rate schedules shall be filed "together with all contracts which in any manner affect or relate to such rates, charges, classifications and services." Petitioner fully complied with this provision in filing the contracts entered into by its agents and the pre-existing contract in which it acquired an interest when it acquired its ownership in a producing property.

respect to such natural-gas company" a certificate issued by the Commission authorizing such act.

Petitioner is itself clearly engaged in a sale of gas subject to the Commission's jurisdiction in each of the fact situations here involved, within the meaning of the provisions of the Natural Gas Act, particularly as construed by this Court in *Phillips Petroleum Company v. State of Wisconsin, 347 U. S. 672 (1954)*. In each of three of the situations Petitioner is so engaged as the principal in a sale made by its agent, and in each case the agent's authority is plainly limited to making the sale and delivering the gas and does not extend to the making of filings with the Federal Power Commission in connection with the sale. In the fourth situation Petitioner is engaged directly in the sale, having acquired an interest in a pre-existing gas sale contract at the time it acquired its interest in the gas producing property involved. Thus, Petitioner is the natural-gas company to which the above mentioned sections of the Act are directly applicable.

In each of the four situations the Commission itself has found, in a formal order issued after hearing and with full knowledge of the facts, that Petitioner is itself engaged in a jurisdictional sale of gas. This finding was entered in the orders by which Petitioner was issued certificates covering the sales (R. 16321, 85; R. 16548, 73; R. 16548, 479). It is noteworthy that in the later orders vacating the certificates (R. 16321, 104; R. 16548, 82) the Commission did not withdraw or qualify its earlier findings that Petitioner is engaged in jurisdictional sales. These findings establish

irrevocably the basis upon which Petitioner is, under the Natural Gas Act, both privileged and required to make its own rate and certificate filings with the Commission and thus determine the general course of regulation of its gas sales.

When the Commission issued its orders here under review rejecting Petitioner's rate filings and vacating its certificates (R. 16020, 61; R. 16021, 216; R. 16213, 116; R. 16321, 104; R. 16410, 225; R. 16410, 235; R. 16548, 82), without any hearing in the matters, it stated as its sole ground, not that Petitioner is not engaged in the sales involved, but rather that Petitioner is not a "signatory party" to the gas sale contracts involved. Yet nowhere in the Natural Gas Act did Congress either express or imply that lack of "signatory party" status might be considered a basis for prohibiting persons subject to the Act from making rate and certificate filings which are otherwise required and permitted by the Act. The conclusion reached by the Commission in this regard is in direct conflict with this Court's conclusion in *United Gas Pipe Line Company v. Mobile Gas Service Corporation*, 350 U. S. 332 (1956), that a natural-gas company may devise rates by contract arrangements of its own choosing and that the Natural Gas Act envisages rate schedules thus initiated by contract by the natural-gas company itself, not by the Commission. In the situations here involved Petitioner devised contract arrangements through agents and by assignment, but the contracts are, under the Act, no less subject to the rate and certificate filing requirements on that account. Moreover,

even if "signatory party" status were significant, Petitioner has such status through its agents and, in one case, by assignment of such status.

The effect of the Commission's orders is to impose upon Petitioner, with respect to the gas sales involved here, the rate and certificate filings of the various operators of the gas-producing properties and, in one case, the operator of a gas processing plant, together with all of the built-in consequences of those filings and of future proceedings before the Commission involving those filings. This effect strikes at the heart of the matter since it forever deprives Petitioner of the right which inherently accrues to any natural-gas company under the Natural Gas Act to initiate and control the scope of the regulation of its own gas sales by virtue of the nature of its own filings. This right is obviously of paramount importance in connection with the initiation and defense of rates. The Commission's orders would deprive Petitioner of the rights it is guaranteed by the Act in the process of regulation, but would nevertheless impose on Petitioner at the same time, without Petitioner's voice, all of the consequences of regulation through the device of indirectly regulating Petitioner's gas sales in the name and in the proceedings of other parties. Petitioner has continuously asserted, and asserts here, that there is no justification for such an administrative device and procedure within the framework of the Natural Gas Act, because the provisions of the Act with respect to rates and certificates clearly relate separately and independently to each natural-gas company and each jurisdictional gas sale.

It is apparent that the Commission conceives of its orders here under review as furthering a policy determination to relieve itself of the burden of administering so-called "multiple filings" of gas sale contracts. But as the Court of Appeals for the Third Circuit so aptly said under similar circumstances in *Mississippi River Fuel Corp. v. Federal Power Commission, 202 F. 2d 899 (1953), dism'd., 345 U. S. 988*, "If changes in the law are needed, or more personnel to administer existing law, or both, it is not for the administrative agency or the Courts to try to make up for this deficiency by taking unauthorized short cuts or indulging time saving procedures which fail to accord parties the rights which the law as written gives them."

In affirming the Commission's orders the Court of Appeals has stated in effect that the Commission's power under the Act to make rules and determine classifications is ample to justify its orders. But the rule-making power and the power to classify persons and matters which are granted the Commission in Sections 4(c) and 16 of the Act do not in any sense impair the substantive provisions of the Act. Those powers extend only to the prescription by regulation of the form and detail of the filings which the substantive provisions of the Act clearly require and permit. The authority to make rules and classify persons and matters can not under the Act properly be regarded as authority on the part of the Commission to prohibit by the rule-making process a filing which the substantive provisions of the Act both compel and permit.

Without directly discussing the impact of the substantive provisions of Sections 4 and 7 of the Act, and relying exclusively on the general rule-making authority of the Commission, the Court below disposed of the entire issue relating to the substantive provisions of the Act with this summary statement: "We agree with the Commission that each of the sales here involved made by an operator under an operating agreement could be properly treated as a single jurisdictional sale of the unit or leasehold gas production, and that each such sales contract could properly be the subject of a single rate filing." It is submitted that this conclusion is patently in error and should be reviewed by this Court. The Act provides for no discretion on the part of the Commission to treat multiple gas sales as a single jurisdictional sale of gas for purposes of regulation, but instead requires separate treatment of each gas sale subject to the jurisdiction of the Commission. Since the Act provided for no special contrary standard, the existence or non-existence of a separate jurisdictional gas sale must be determined in accordance with ordinary contract principles. *United Gas Pipe Line Company v. Mobile Gas Service Corporation, 350 U. S. 332 (1956).* In accordance with such principles the sale of Petitioner's share of the gas involved in each case is clearly a sale by Petitioner itself, acting either as the principal in an agency transaction or by acquisition of an interest in a gas sale contract already in existence. There is no authority in the Act for the treatment of Petitioner's sale of its gas and the unit or plant operator's sale of its gas as a single jurisdictional sale of both quantities. The substantive provisions of the Natural

Gas Act operate independently as to each such separate sale.

b. *The Orders Under Review Are Immediately and Substantially Detrimental to Petitioner.*

The Court of Appeals essentially predicated its opinion upon the absence of any harm, injury or prejudice to Petitioner resulting from the Commission orders under review. However, as stated above, since the Natural Gas Act clearly both compels and permits Petitioner under the circumstances of this case to make its own rate filings and secure its own certificates covering its gas sales, the criterion of harm, injury and prejudice is not at all applicable in judging the validity of the orders rejecting such filings. This case involves only the application of statutory standards which provide for no exercise of discretion on the part of the Commission. Where the Commission is by statute without discretion in a matter, there is no legal issue as to the presence or absence of injury, whether or not injury has been or may be shown. This is true, of course, for the simple reason that when Congress passes an Act empowering an administrative agency to carry on governmental activities, the power of the agency is circumscribed by the authority granted. *Stark v. Wickard, 321 U. S. 288, 309 (1944); Securities and Exchange Commission v. Chenery Corporation, 318 U. S. 80, 94, 95 (1943); Morgan v. United States, 298 U. S. 468, 479 (1936); Montana-Dakota Utilities Company v. Federal Power Commission, 169 F. 2d 392, 397 (8th Cir. 1948), cert. denied, 335 U. S. 853.* In this case the Commission has no color of statutory authority to

issue the orders under review and the orders are thus invalid, regardless of whether Petitioner has shown injury to it as flowing from the orders. Since the Court below has failed to consider this matter adequately its judgments should be reviewed.

Even if it be conceded, *arguendo*, that the Natural Gas Act grants to the Commission some general discretion in the substantive matter of filing rate and certificate documents, nevertheless the Commission's orders here under review constitute an abuse of such discretion and Petitioner is and will be injured and prejudiced by the orders. In this respect the orders deprive Petitioner of the due process which is guaranteed by the Fifth Amendment to the Constitution of the United States. The Court below failed in its opinion to give adequate consideration or recognition to the elements of injury and prejudice involved in this case and erred in concluding that no harm, injury or prejudice to Petitioner has resulted or will result from the Commission's orders.

Among the elements of prejudice and injury flowing from the Commission's orders is the fact that the orders, in rejecting Petitioner's rate and certificate filings and imposing the filings of other parties upon Petitioner with respect to its gas, deprive Petitioner of its substantive right, inherent in the Act, to make rate filings so as to preserve and protect its contract rights itself where an operator might fail to file, to make such filings in the form which will best promote its interests within the scope of the Act, and to make such filings in a timely manner so

as to make them fully effective in accordance with the contract where an operator might be delinquent. These are not problems which necessarily anticipate active malfeasance on the part of other private parties, as the Court below seems to suggest, but are simply manifestations of the inherent right of each natural-gas company under the Act to conduct its own business as it deems best within the scope of the Act. The Commission's orders, on the other hand, would impose another private party upon Petitioner as its agent for governmental regulation, without any voice, choice or control on the part of Petitioner. Moreover, the comment of the Court below that no injury to Petitioner has yet been shown to have occurred on account of this deprivation of right amounts to a suggestion that it will be soon enough to grant relief when positive money damage exists. But the injury has already occurred in the deprivation of right itself, and the remedy for some positive money damage which may later occur does not lie in compelling Petitioner to seek special *ad hoc* relief from the Commission—relief which would be granted, if at all, at the Commission's discretion, relief which would nearly always come too late to fully effectuate Petitioner's contract rights, and relief which can only follow long delays and complicated procedures. The only proper remedy is one which avoids the injury and the possibility of positive damage—and that remedy lies in permitting Petitioner to make its own filings in the first instance, just as the Natural Gas Act contemplates.

Injury to Petitioner resulting from the Commission's orders is even more readily apparent in the fact that two

of the operators whose filings would be imposed on Petitioner by those orders now have general rate proceedings under Section 5 of the Act pending before the Commission. The Court below seems to view the sole problem in this connection as being whether the Commission would permit Petitioner to intervene in such proceedings in order to protect its interest. In truth, Petitioner's being compelled as a result of the Commission's orders here under review to intervene in a prolonged proceeding involving all of the gas sales of the operator in order to protect an interest in one gas unit is serious injury indeed, even assuming that such intervention would be permitted by the Commission. But the real injury goes far beyond the matter of intervention. In such a proceeding involving the operator the Commission considers that one of the relevant issues is the cost of service and revenue requirements of such operator, and it is on the basis of those factors peculiar to the operator that all rates involved in the proceeding may be determined. Among those rates, according to the Commission's orders here under review, is the price applicable to Petitioner's gas. Hence, intervention by Petitioner and even active participation in the proceeding by Petitioner would be a futile gesture because factors germane to Petitioner are simply not in issue. Under the Commission's orders and the opinion of the Court below there is, then, no way in which Petitioner can protect its interest with respect to its gas. That is serious present injury without question.

Moreover, the same element of injury to Petitioner is inherent in any suspension proceeding under Section 4 of

the Act involving any of the rate schedules of other parties which have been imposed upon Petitioner by the Commission's orders here under review.

c. *The Orders Under Review Were Unlawfully Issued Without Notice or Hearing.*

The Commission's orders under review which rejected Petitioner's rate filings and vacated Petitioner's certificates were, without exception, issued without notice and without any hearing. For that reason alone the orders are invalid under the terms of the Natural Gas Act, the Administrative Procedure Act, and the Fifth Amendment to the Constitution of the United States.

With respect to rate schedule filings the Commission's entire basic authority is contained in Sections 4 and 5 of the Act. In so far as an initial rate schedule filing is concerned, the Commission is obliged to accept the filing if it meets all formal requirements. Under Section 4(e) the Commission may suspend a subsequent change in a rate schedule after observing certain statutory requirements. If the Commission takes such action it must ultimately "enter upon a hearing" and may enter a valid order affecting such change only "after full hearings." Under Section 5(a) of the Act, the Commission may enter an order altering a filed rate schedule only "after a hearing." Similarly, with respect to certificate applications, Section 7(c) of the Act requires that in all certificate cases "the Commission shall set the matter for hearing," and such a hearing is a matter of right. *Northeastern Gas Transmission Company*

v. Federal Power Commission, 195 F. 2d 872, 880 (3d Cir. 1952), cert. denied, 343 U. S. 818. Since the filings made by Petitioner met all formal requirements, any lawful rejection of such filings could occur only after a hearing, by virtue of the requirements of the Natural Gas Act itself.

Moreover, the Commission's orders purporting to vacate Petitioner's certificates are void similarly on account of the failure of the Commission to comply with the mandatory requirements of Section 9(b) of the Adiminstrative Procedure Act. With certain exceptions not applicable here, that section provides that no revocation of any license (including, by definition, a certificate) shall be lawful unless "prior to the institution of agency proceedings therefor, facts or conduct which may warrant such action shall have been called to the attention of the licensee by the agency in writing and the licensee shall have been accorded opportunity to demonstrate or achieve compliance with all lawful requirements." In the issuance of the orders under review vacating Petitioner's certificates, the Commission made no effort to comply with Section 9(b) of the Administrative Procedure Act, it called no facts or conduct to the attention of Petitioner, and it did not afford to Petitioner an "opportunity to demonstrate or achieve compliance with all lawful requirements." The orders, then are in conflict with the important basic procedural requirements which Section 9(b) of the Act imposes upon the Commission.

Aside from the various statutory requirements of notice and hearing as a prerequisite to the validity of orders which have the effect of canceling certificates and rate schedules,

it is equally clear that the due process clause of the Fifth Amendment to the Constitution of the United States compels the same conclusion. For example, in *L. L. Wilson, Inc. v. Federal Communications Commission, 170 F. 2d 793 (D. C. Cir. 1948)*, the Court held that a hearing must precede a decision on modification of a license in order to avoid a conflict with the Constitution, even though the statute did not expressly provide for a hearing. And in *Standard Airlines, Inc. v. Civil Aeronautics Board, 177 F. 2d 18 (D. C. Cir. 1949)*, the Court held that an order suspending a registration must be set aside in the absence of a hearing, this conclusion being reached under the Constitution. If an order on modification of a license or an order suspending a license merits an advance hearing in order to accord constitutional due process to the licensee, *a fortiori* a proposal to *vacate* a certificate and *cancel* and *reject* rate schedules, as in Petitioner's case, must require notice and hearing in order to accord constitutional due process to Petitioner.

This Court made the requirement most clear in *Wong Yang Sung v. McGrath, 339 U. S. 33 (1950)*, when it held that even in the absence of an express provision in the statute for a hearing as a prerequisite to an administrative order of quasi-judicial character, a hearing is nevertheless compelled by the Constitution, and that such a hearing is subject to the formal procedural requirements of Section 5 of the Administrative Procedure Act. And this Court recognized the applicability of the doctrine of the *Wong Yang Sung* case to licensing proceedings of administrative agen-

cies by its per curiam decision in *Rigs & Co. v. United States, 341 U. S. 907 (1951), reversing 96 F. Supp. 452,* on the express authority of the *Wong Yang Sung* case.

It is now more than ever evident that the due process clause compels a hearing prior to action by any administrative agency in a licensing proceeding, even though the governing statutes may be silent on the subject. If the grant or denial of a license by an administrative agency must be preceded by notice and hearing in order to accord due process, then without doubt the vacation or revocation of a license previously issued or a rate schedule previously accepted for filing, as in Petitioner's case, must be preceded by notice and hearing—otherwise, the order is void for want of due process.

The Court below concluded in this respect that Petitioner was not entitled to notice and hearing prior to the issuance of the Commission's orders under review because no fact question was involved and hence no evidence would have been material, and because "the opportunity to be heard on questions of law is not an inherent element of procedural due process in the determination of a procedural question," citing *Federal Communications Commission v. WJR, The Goodwill Station, Inc., 337 U. S. 265 (1949).* But even if only a question of law were involved, as the Court below said, the requirement of opportunity to present argument, oral or otherwise, in some type of hearing before the administrative agency is not necessarily eliminated, as the Court below suggests. The very decision of this Court cited by the Court below makes clear that the enforcement of the

requirement varies from case to case, depending on the nature of the question and the statute involved. And in that case this Court was obviously influenced by the explicit terms of the statute and the fact that the question involved had been considered by the administrative agency on a written submission prior to its ruling. Here neither element is present.

The more serious error in this connection appearing in the opinion of the Court below lies in the Court's assumption that the principal question on the merits in this case is a mere procedural one. The Commission's orders under review have substantive consequences going far beyond mere matters of procedure. These are consequences which should not be permitted to occur without notice and hearing. There are no matters covered by the Natural Gas Act which are more substantive in nature than those relating to rate schedules and certificates. When its rate schedules were rejected and its certificates were vacated summarily, Petitioner was deprived of substantive rights substantially affecting the whole future course of the regulation of the gas sales involved. These can not be mere procedural rulings as to which notice and hearing requirements can properly be ignored.

Also essential to the conclusion of the Court below that the Commission was not obliged to grant notice and hearing prior to the issuance of its orders is the Court's statement that no fact question was involved (and, thus, only a question of law was present) and no evidence would have been material. Elsewhere in its opinion the Court concludes on

the merits that the Commission's orders should be affirmed because no injury to Petitioner has been shown and "none is threatened so far as it appears," the obvious inference being that upon a satisfactory showing of injury Petitioner would be entitled to have the Commission's orders set aside. Yet throughout the proceedings before the Commission Petitioner was consistently denied all opportunity for a hearing at which the elements of injury to Petitioner resulting from the proposed orders could be shown by evidence of the kind and quantity now seemingly required by the Court below. An adequate showing of injury requires a proper record made in the course of a conventional hearing, for the existence of injury to Petitioner, present and threatened, is clearly a fact question, despite the Court's ultimate conclusion that no fact question was involved. Moreover, the Court's opinion determines that such fact issue of injury is the critical issue in this case. In being deprived of a hearing Petitioner has been effectively deprived of the opportunity to meet this issue.

Petitioner's rate schedule and certificate application filings were made, not only in accordance with all of the substantive and formal requirements of the Natural Gas Act, but also in accordance with all of the pertinent general regulations of the Commission in effect at the time the filings were made. The opinion of the Court below views the issue involved as being, in part, whether the Commission has the authority to make *ad hoc* adjudications which are a departure from its general rules. The point is misconceived. The Commission's general authority to issue *ad*

hoc orders is not challenged here. The important point is that when an *ad hoc* adjudication is proposed which is in conflict with an existing general rule of the administrative agency on the same subject, particularly in the circumstances of this case, such an adjudication should not be permitted to occur without prior notice and hearing. And that conclusion is implicit in the principal authority cited by the Court below, *American Power & Light Company v. Securities and Exchange Commission*, *329 U. S. 90, 108 (1946)*. Again, this case is not concerned with an *ad hoc* change in a mere procedural rule, as the Court below suggests by citing *National Labor Relations Board v. Monsanto Chemical Company*, *205 F. 2d 763 (8th Cir. 1953)*, but is concerned rather with an *ad hoc* change in rule which has serious substantive consequences. Notice and hearing in advance should be required.

d. *The Orders Under Review Do Not Contain Adequate Findings and Conclusions.*

The Commission's orders under review are invalid for want of an adequate and proper statement of findings and conclusions. In this respect the orders are in conflict with the requirements of the Natural Gas Act, the Administrative Procedure Act, and the due process clause of the Fifth Amendment to the Constitution of the United States. The Court below failed in its opinion to consider the absence of proper findings and for that reason alone its judgments should be reviewed.

In the orders rejecting Petitioner's rate schedule filings the Commission found variously that Petitioner is not a

"signatory party" to a gas sale contract, that duplicate filings of gas sale contracts are not in the public interest, and that to permit duplicate filings "can only result in confusion." Similarly, but less elaborately, in the orders vacating certificates previously issued to Petitioner, the Commission found that Petitioner is not a "signatory party" to a gas sale contract, and that Petitioner is not a "proper party" to be issued a certificate. With such findings (together with references to orders, issued in other cases, which were no more complete) the Commission rejected Petitioner's rate filings and vacated its certificates.

The Commission's findings of fact in no way support its ultimate conclusion. The orders are absolutely devoid, among other things, of any findings or conclusions which in any way relate the findings actually made to the scope of the Commission's authority as to rate schedules under Section 4 of the Natural Gas Act or as to certificates under Section 7 of the Act. Nor do the findings made in any way lead to the conclusion that Petitioner's filings did not meet the formal requirements of the Act or the Commission's regulations, or that Petitioner is not entitled under the Act to make its own rate and certificate filings. A conclusion on such matters is essential to a determination of the validity of the Commission's orders. The basic reasoning of the Commission in the orders is so obscure as to amount to a denial of Petitioner's right to fair play and due process in the presentation of the issues.

The Natural Gas Act, as construed by this Court, requires clarity and completeness in the basic or essential

findings on which the Commission's orders rest. *Colorado-Wyoming Gas Company v. Federal Power Commission*, *324 U. S. 626, 634 (1945)*. Likewise applicable is Section 8(b) of the Administrative Procedure Act which requires that decisions of Administrative agencies shall include a statement of "findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record." But even absent specific statutory standards, the requirement of basic or essential findings is a guiding principle of procedural due process. *Securities and Exchange Commission v. Chenery Corporation, 318 U. S. 80 (1943)*.

In connection with the matter of inadequate findings in the Commission's orders, a matter not discussed in the opinion of the Court below, it should be pointed out that the Court below sustained the orders on a ground which was not invoked by the Commission. On the merits the principal basis expressed by the Court in its opinion is that "each of the sales here involved made by an operator under an operating agreement could be properly treated as a single jurisdictional sale of the unit or leasehold gas production, and that each such sales contract could properly be the subject of a single rate filing." This basis is nowhere expressed in the Commission's orders. The Commission in its orders has not disputed Petitioner's position that Petitioner is itself separately engaged in each instance in a jurisdictional sale of gas and that there is no single sale which includes both Petitioner's gas and the operator's gas. The Commission seemingly has merely postulated that

its rule-making power permits it to impose another party's filings upon Petitioner, despite the existence of Petitioner's separate jurisdictional sales. There is a vast difference between the basis thus expressed by the Court below and the only basis which can be gleaned from the Commission's orders. And the difference in basis involves a very substantial difference in the future course of regulation of the gas sales involved. If the Commission's basis is correct, Petitioner, even without its own rate schedules and certificates, may be subject to the jurisdiction of the Commission in other respects. On the other hand, if the Court's basis is correct, Petitioner is itself not engaged in jurisdictional gas sales and is not in the circumstances of this case a natural-gas company subject to the jurisdiction of the Commission, since the only gas sales involved are made by the operators, the Court said.

Petitioner submits that neither basis is a lawful one. But the important point here is that the reviewing court must judge the propriety of administrative orders solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the Court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. *Securities and Exchange Commission v. Chenery Corporation, 332 U. S. 194, 196 (1947), 318 U. S. 80 (1943); Colorado-Wyoming Gas Company v. Federal Power Commission, 324 U. S. 626, 634 (1945).* Since the Court below purported in its opinion to do just that—substitute a ground or basis different from that employed by the Commission—the Court's judgments should be reviewed.

e. The Commission Unlawfully Certified Documents Pertaining to Other Proceedings As Part of the Record Below

In each of four of the cases in the Court below the Commission certified to the Court as part of the record a mass of documents relating to the operator of the gas unit or the gas processing plant, to which certification Petitioner objected in each case by a Motion to Require Correction of Imperfect Record (Supp. R. 16020, 5; Supp. R. 16021, 9; R. 16410, 55).[3] The Commission filed objections to the motions (Supp. R. 16020, 13; Supp. R. 16021, 17; R. 16410, 62), and Petitioner responded to such objections (Supp. R. 16020, 17; Supp. R. 16021, 21; R. 16410, 69). In its opinion disposing of all of the cases the Court below denied the motions without discussion.

The documents which are the subject of Petitioner's motions to correct the record do not in any manner relate to Petitioner, and they were filed in proceedings to which Petitioner is not now and has never been a party. Such documents appear to relate only to the operator of the gas unit or gas processing plant involved in each case, none of which parties has ever been authorized by Petitioner to make any filing with the Commission or institute any proceeding in Petitioner's behalf. The documents involved can in no sense be considered a part of the formal record of Petitioner's proceedings before the Commission since there has never been a hearing in such proceedings in which such documents could have been introduced as evidence.

[3] In one case below, No 16548, the motion and the responses were not printed in the record.

The pertinent standard of the Natural Gas Act is contained in Section 19(b), providing, in part, that "the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered." The parallel provision of the Administrative Procedure Act is contained in Section 7(d) providing, in part, that "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision * * *."

The operators' filings with the Commission and the related documents pertaining to those parties do not meet the standard of either statute. It is apparent on the face of the orders under review that those documents were not the "record upon which the order complained of was entered," since the only record in Petitioner's proceedings was made by Petitioner itself with its own filings and there has never been a hearing on the issues in this case at which other documents could have been made an additional part of the record. Moreover, those documents were obviously not "filed in the proceeding" before the Commission which resulted in the orders here under review, within the meaning of the Administrative Procedure Act.

Aside from the provisions of the statutes, it is submitted that in denying Petitioner's motions to correct the record and in denying, at the same time, Petitioner's right to notice and hearing, the Court below has reached an incongruous result which has the effect of depriving Petitioner of procedural due process. On the one hand, the Commission has been permitted to freely include in the records of the

cases in the Court below at its will voluminous filings of other parties in proceedings in no way related to Petitioner, without any requirement of hearing or any other procedure by which such evidence might be tested for relevance and accuracy. And on the other hand, Petitioner has been denied any semblance of hearing where it might have had a corresponding opportunity to present evidence bearing on these matters. In effect the Commission has introduced evidence into the record without the restriction inherent in the hearing procedure, while Petitioner has been denied a corresponding right to present evidence even with the restrictions of hearing procedure. In these circumstances the Court's denial of Petitioner's motions to correct the records should be reviewed.

II. Decision Below Conflicts With Applicable Decisions of This Court.

As already pointed out, in all of the fact situations involved here Petitioner filed applications for certificates which met all formal requirements of the Natural Gas Act and the Commission's regulations. In due course hearings were held on those applications and in each case a certificate was issued to Petitioner by an order containing all requisite factual and jurisdictional findings. It is submitted that the Commission thus exhausted its authority in the matters and had no further authority to vacate the certificates thus issued.

This Court, in *United States v. Seatrain Lines*, 329 U. S. 424 (1947), under analogous circumstances, had before

it the question of the validity of an order of the Interstate Commerce Commission revoking a certificate previously issued to a water carrier. This Court affirmed a District Court judgment setting aside the order, and held that under Part III of the Interstate Commerce Act (which, like the Natural Gas Act, is based on Part I of the Interstate Commerce Act) the Interstate Commerce Commission is without power to revoke a certificate. The Court commented that it need not determine the Commission's statutory power to correct mistakes because it was apparent that the issuance of the original certificate was not an "inadvertent" error which the Commission's subsequent action was intended to correct, but rather the subsequent revocation was for the purpose of executing a new policy announced in another proceeding.

In this case likewise the Commission is without specific authority in the Natural Gas Act to revoke a certificate previously issued and, therefore, does not possess such authority. And in this case likewise, even if the authority to correct clerical or inadvertent errors is implied, it is apparent from the record that the purported vacation of Petitioner's certificates was not to correct an "inadvertent" error but to execute a new policy. This Court has held in the *Seatrain* case that the Commission does not have such authority after the certificates have been issued and the matters have been closed. The opinion of the Court below is, therefore, in conflict with the *Seatrain* decision and should be reviewed.

It is submitted that the opinion of the Court below is also in conflict with the decision of this Court in *United Gas Pipe Line Company v. Mobile Gas Service Corporation, 350 U. S. 332 (1956)*. The Court below has held as the principal basis for its affirmance of the Commission's orders that "each of the sales here involved made by an operator under an operating agreement could be properly treated as a single jurisdictional sale of the unit or lease-hold gas production, and that each such sales contract could properly be the subject of a single rate filing." Yet each sale of Petitioner's gas here involved is a separate sale made by Petitioner, either as the principal acting through an agent or directly under a gas sale contract in which it was assigned an interest. This Court held in the *Mobile* case that a natural-gas company may devise rates by contract arrangements of its own choosing and that the Natural Gas Act contemplates rates schedules thus initiated by the natural-gas company itself, not by the Commission. Petitioner acted in strict accordance with the principles of *Mobile* in making its rate schedule filings here involved. Under the circumstances, the Act provides for no discretion on the part of the Commission to treat multiple gas sales as a single jurisdictional sale of gas for purposes of regulation, but instead requires separate treatment of each gas sale subject to the jurisdiction of the Commission. In its holding to the contrary the opinion of the Court below is in conflict with the decision of this Court in the *Mobile* case, and the judgments of the Court below should, therefore, be reviewed.

CONCLUSION

For the reasons hereinabove set forth it is urged that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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